SANUSI ISMAIL

v.

PP

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD NOOR AHMAD JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: D-05-125-1995]
6 AUGUST 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 882.3g of cannabis - Presumption of trafficking under s. 37(da) - Whether may only be invoked solely on the basis of an express and affirmative evidential finding of possession - Whether may be invoked based upon statutory presumption of possession under s. 37(d) - Rule against double presumptions - Whether accused had custody or control of anything containing dangerous drug - Whether presumption of possession could be invoked - Whether accused guilty of unlawful possession under s. 6*

This was an appeal from the decision of the High Court convicting the accused under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and sentencing him to death under s. 39B(2) thereof. In coming to his conclusion that the accused was guilty of trafficking in a dangerous drug (cannabis), the learned judge had applied both the statutory presumptions of possession and of trafficking under s. 37(d) and s. 37(da) DDA, consecutively, against the accused. Before the justices of appeal herein, the conviction was attacked on the archetypal ground that the learned judge had run foul of the classic rule against double presumptions as laid down in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC.

Held (allowing the appeal)
Per Abdul Kadir Sulaiman JCA delivering the judgment of the court:

[1] The statutory presumption of trafficking under s. 37(da) DDA can only be invoked on the exclusive basis of an express and affirmative **evidential finding** of possession – as understood in criminal law – and **not** upon the statutory presumption of possession under s. 37(d) DDA. The learned judge had thus fallen into error when he found the accused guilty of trafficking in 882.3g of cannabis based upon

the statutory presumption of trafficking in s. 37(da) DDA which he invoked and applied on top of the statutory presumption of possession in s. 37(d) DDA which he had earlier invoked. This was a serious misdirection and one that was fatal to the charge of trafficking in a dangerous drug under s. 39B(1)(a) DDA. (pp 450 c-g & 451 a-b)

[2] The basic or primary facts did **not** support an evidential finding of actual possession against the accused; hence, the statutory presumption of trafficking under s. 37(da) DDA could not be, and should not have been, invoked. Notwithstanding this, evidence was led which showed that the accused had in his custody or under his control a plastic packet containing a substance which, upon analysis, was found to be 882.3g of cannabis. The accused could, therefore, be deemed to have been in possession of the cannabis and to have had knowledge of the same under s. 37(d) DDA. (p 451 c-h)

[2a] The accused was unable to rebut the statutory presumption of possession under s. 37(d) DDA. Consequently, he should be found guilty and convicted under s. 6 DDA for being in unlawful possession of 882.3g of cannabis. (p 452 a-b)

[Conviction quashed, death sentence set aside. Substituted with conviction under s. 6, and 16 years' imprisonment and 10 strokes of whipping under s. 39A(2) DDA.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupakan rayuan dari keputusan Mahkamah Tinggi yang mensabitkan tertuduh di bawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 ('DDA') dan menjatuhkan hukuman mati di bawah s. 39B(2). Dalam memutuskan bahawa tertuduh bersalah mengedar dadah merbahaya (ganja), yang arif hakim telah menggunapakai kedua-dua anggapan berkanun mengenai milikan dan mengedar di bawah s. 37(d) dan s. 37(da) DDA, berturutan, terhadap tertuduh. Di hadapan hakim rayuan, sabitan ini disangkal dengan alasan tipikal bahawa yang arif hakim telah tersilap kerana ia bercanggah dengan rukun mencegah anggapan dua kali sepertimana yang dinyatakan di dalam *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC.

Diputuskan(membenarkan rayuan)
Oleh Abdul Kadir Sulaiman HMR menyampaikan penghakiman mahkamah:

[1] Anggapan berkanun mengedar di bawah s. 37(da) DDA hanya boleh digunakan secara esklusif pada dapatan keterangan yang nyata berhubung dengan milikan – sebagaimana yang difahami di dalam undang-undang jenayah – dan tidak pada anggapan berkanun milikan di bawah s. 37(d) DDA. Yang arif hakim dengan itu telah tersilap apabila beliau memutuskan bahawa tertuduh bersalah mengedar 882.3g ganja berdasarkan pada anggapan berkanun mengedar di bawah s. 37(da) DDA yang mana telah digunapakai oleh beliau sekali dengan anggapan berkanun milikan di bawah s. 37(d) DDA yang mana telah terdahulunya digunakan olehnya. Ini merupakan satu salah arah yang serius dan ianya sesuatu yang membawa padah kepada sabitan mengedar dadah merbahaya di bawah s. 39B(1)(a) DDA.

[2] Fakta asas atau primer tidak menyokong dapatan keterangan berhubung dengan milikan sebenar terhadap tertuduh; dari itu, anggapan berkanun mengedar di bawah s. 37(da) DDA tidak boleh, dan tidak patut, digunakan. Namun begitu, keterangan diberikan dan menunjuk bahawa tertuduh mempunyai dalam jagaan beliau atau di bawah kawalannya sebungkus peket plastik yang mengandungi bahan, yang setelah dianalisa, merupakan 882.3g ganja. Tertuduh boleh, dari itu, dianggap memiliki ganja dan mempunyai pengetahuan mengenainya di bawah s. 37(d) DDA.

[2a] Tertuduh tidak dapat mematahkan anggapan berkanun mengenai milikan di bawah s. 37(d) DDA. Maka dari itu, beliau wajar didapati bersalah dan disabitkan di bawah s. 6 DDA kerana mempunyai milikan haram 882.3g ganja.

Sabitan dibatalkan, hukuman mati diketepikan. Diganti dengan sabitan di bawah s. 6, dan 16 tahun penjara dan 10 kali rotan di bawah s. 39A(2) DDA.]

Case(s) referred to:
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***
Subramaniam Arumugam v. PP [2000] 2 CLJ 1 FC ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(dist)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2), 39B(1)(a), 39B(2), 39(2)(f)

For the appellant - Latifah Ariffin; M/s Latifah Ariffin & Co
For the respondent - Patricia Tan Ghee Phaik

Reported by Gan Peng Chiang

JUDGMENT

Abdul Kadir Sulaiman JCA:

We heard this appeal on 31 October 2001. We orally allowed the appeal and quashed the conviction and set aside the death sentence imposed by the learned judge for an offence under s. 39B of the Dangerous Drugs Act 1952 ("the Act"). Instead, we substituted for a conviction under s. 6 of the Act and sentenced the appellant to 16 years imprisonment to take effect from his date of arrest plus whipping of 10 strokes under s. 39A(2) of the Act. Our learned brother, Datuk Wira Haji Mohd. Noor bin Haji Ahmad JCA, who sat with us on that day has since retired from service. On 12 November 2001, the public prosecutor filed its notice of appeal against our said decision. We now provide our reasons for arriving at such a decision.

In the High Court, the appellant was convicted for an offence under s. 39B(1)(a) of the Act, which is trafficking in dangerous drugs, to wit cannabis, and accordingly was sentenced under s. 39B(2) of the Act to a mandatory death sentence. Against that decision, he had appealed to us.

The public prosecutor relied on the two presumptions provided by s. 37 sub-sections (d) and (da) of the Act which the learned judge accepted, to obtain the conviction & sentence of the appellant in the High Court. The relevant sub-section respectively, states:

> 37. Presumptions.
>
> In all proceedings under this Act or any regulation made thereunder:
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

(da) any person who is found in possession of:

(vi) 200 grammes or more in weight of cannabis,

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Having applied the two aforesaid presumptions against the appellant, the learned judge held at the end of the case for the prosecution:

> Pada akhir kes pendakwa, dan selepas menilai maksimum segala keterangan, saya memutuskan pihak pendakwa telah berjaya mengadakan suatu kes sebagaimana peruntukan seksyen 180 Kanun Prosedur Jenayah, dan juga memutuskan anggapan di bawah seksyen37(d) dan 37(da)(vi) Akta telah wujud, dan sehingga sebaliknya terbukti, tertuduh disifatkan pemilik dan mengtahui kehadiran cannabis dalam bungkusan P5, dan oleh kerana berat cannabis melebehi minimum satutori 200 gram, maka tertuduh dianggap sebagai pengedar dadah sedemikian, dan dengan itu saya telah memanggil tertuduh membela diri.

In other words, *inter alia*, the learned judge ruled that there arose the two presumptions in the case, and unless and until rebutted, the appellant is deemed to be in possession with knowledge of the existence of the cannabis in packet P5, and as the weight of the said cannabis exceeds the statutory minimum of 200 grams, the appellant is deemed to be the trafficker of the drug. For that reason, he called upon the appellant to enter into his defence.

Having heard the defence, the learned judge held:

> Selepas mengkaji kesemua keterangan pihak pendakwa dan pembela pada keseluruhannya, saya dapati tertuduh gagal mematahkan atas imbangan kebarangkalian anggapan-anggapan milikan cannabis yang telah wujud di bawah seksyen 37(d), dan anggapan pengedarannya yang telah wujud di bawah seksyen 37(da)(vi) Akta. Tertuduh mengedar dadah cannabis seberat 882.3 grams dengan membawanya. Saya juga berpuashati tertuduh telah gagal menimbulkan sebarang keraguan yang munasabah ke atas milikan dan pengedaran dan pengedaran dadah cannabis itu. Dengan itu, saya berpuashati pihak pendakwa telah membuktikan kesnya tanpa keraguan yang munasabah, dan oleh yang demikian, saya dapati tertuduh bersalah sebagaimana pertuduhan. Saya sabitkannya. Tertuduh dihukum mati seperti diperuntukkan di bawah seksyen 39B(2) Akta.

So, the learned judge found the appellant guilty of the offence charged, as the two presumptions remain unrebutted by the appellant, which are the presumption of possession with knowledge of the drug and the presumption of trafficking in such drug.

Exhibit "P5" is the packet the appellant was found carrying underneath his right armpit. According to the evidence, cannabis, the subject matter of the offence, was found in two separate transparent plastic wrappers tied at the end of each with a rubber ring. These two wrappers with the content were each found wrapped in double layered Siamese calendar. These two packages were in turn found in the plastic packet, P5. At the time of discovery, the appellant was wearing a wet blue jean and white T shirt on an isolated road in a rubber plantation. This area is in the vicinity of an illegal lending point at the river separating the territories of Malaysia and Thailand. At the time of the interception, PW2 from Unit Pencegah Penyeludupan was not in uniform. Having introduced himself to the appellant, he observed that the appellant's face turned pale but made no attempt to escape. He was then arrested.

Before the interception of the appellant by PW2, a police personnel in uniform, PW4, was on the river bank on the Malaysian side. He saw a *perahu* in the river. He hailed the *perahu* with a view to get the *perahu* to come near him in order to get the man in charge to help him purchase some foodstuff from a weekly market across the river on the Thai side. As the *perahu* was approaching him from a distance of 10 to 15 meters away, he saw the appellant in the *perahu* jumped into the river swimming away using his left hand towards the bank on the Thailand side whilst his right hand was holding up a plastic packet above the water. This incident of a person jumping out of the *perahu* swimming away with his right hand holding up a packet was also seen by PW3 though he could not identify the person as the appellant.

Before us, the learned counsel for the appellant submitted that on the evidence available, the learned judge was wrong in calling for his defence on the charge. The charge involves the proof of possession with knowledge of the nature of the drug by the appellant, and that he was trafficking in the said drug. To achieve this, the prosecution and the learned judge made use of a presumption upon a presumption which are provided respectively, by s. 37(d) and (da) of the Act. Whilst, the presumption under s. 37(d) helps the law to deem the appellant to have been in possession of cannabis with the requisite knowledge, s. 37(da) requires actual knowledge on the part of the appellant of the cannabis he possessed before the presumption of trafficking would arise based upon the minimum weight of such drug the appellant was carrying. It is being submitted that the two presumptions cannot go hand in hand to establish an offence under s. 39B of the Act. In the instant case, the basic or primary fact of knowledge of possession of the drug was never in the evidence to attract the presumption under

s. 37(da) of trafficking in such drug. When PW2 stopped the appellant with P5 under his armpit and introduced himself as a police officer, or anytime thereafter, the appellant did not make any attempt to escape despite the presence of army personnel as well in the area. If the appellant knew of the content of the package, he would not have taken the route he took but might as well hide himself in the rubber plantation. Furthermore, the area being the border between Malaysia and Thailand, the security there was very tight. The fact that the appellant's face turned pale when confronted by PW2 would not suggest that he knew as a fact that what he was carrying was cannabis because it is reasonable to expect anyone to be in such a situation when suddenly stopped by security personnel under the circumstances. He further submitted that it is erroneous on the part of the learned judge to assume that the appellant in fact knew of the nature of the things which he had in his possession for the reason that it was in his physical possession for about one hour from the time he was seen jumping into the river to the time of his arrest.

The learned counsel also submitted that the evidence of PW4 in seeing the appellant jumping into the river from the *perahu* and swimming away holding the package would not help the prosecution to establish knowledge of the drug in the possession of the appellant. PW4 was in police uniform and the place being an illegal landing area, the appellant might have done that for fear of other offences he thought he might be committing.

The learned deputy, on the other hand, submitted, however, that at the time when this case was decided by the learned judge, the case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 was not yet decided. The authority at the time was *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 which according to the headnote is that unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability the defence has rebutted the statutory presumptions of trafficking under s. 37(da) of the Act as a separate exercise even though the court is satisfied on balance that the presumption of possession under s. 37(d) of the Act has not been rebutted. In that case, the learned trial judge having come to the finding of fact that the appellant had not rebutted the presumption under s. 37(d) stated that it followed that the presumption of trafficking under s. 37(da) was also not rebutted. Whereas in the present case, the learned judge did not apply automatic presumption under s. 37(da) upon non-rebuttal of the presumption under s. 37(d) of the Act. He carried out a separate exercise in respect of each of the presumptions. In *Tunde Apatira & Ors v. Public Prosecutor* [2001] 1 CLJ 381, the Federal Court while

acknowledging Muhammed bin Hassan, affirmed the conviction under s. 39B of the Act. Further, in *Teh Geok Hock* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160, the appellant there was convicted under s. 39B despite the use of presumption. Alternatively, the learned deputy submitted that, without the aid of the presumption under s. 37(d), the evidence shows that the appellant had actual knowledge of the drug in his possession to attract the single presumption under s. 37(da) of the Act for the reason that he jumped out of the *perahu* upon seeing PW4 in uniform calling for the boatman.

In fairness to the learned judge, when he made the decision in this matter in 1995, it is true that the case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 was not yet conceived. We cannot speculate what his decision would have been if the case was before him then. The case involves the interpretation of the two relevant subsections of s. 37 of the Act by the highest court in the country which provisions were there at the time the decision in this case was made by the learned judge. The interpretation means that the presumption under s. 37(d) cannot come in aid to invoke the presumption of trafficking under s. 37(da) of the Act. Muhammed bin Hassan determines the law to be that the basic or primary facts needed to raise the presumption under either of the two presumptions under discussion are different. As such a presumption under s. 37(d) would not help to raise the presumption under s. 37(da) of the Act so that both taken together unrebutted would result in the conviction of an accused person under s. 39B of the Act. At pp. 190-191 of the report, Chong Siew Fai CJ (Sabah & Sarawak) delivering the judgment of the Federal Court has this to say:

> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed … trafficking' under s. 37(da) are different. To come to the presumption of possession and knowledge under s. 37(d), one needs only to arrive at a finding of having had 'in custody of under … control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of Parliament is clear, which, in our opinion, is not.

> In our view, to constitute 'possession' under 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express, affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

It is rather unfortunate for the learned judge who had to decide the way he did in the absence of *Muhammed bin Hassan* to guide him as earlier mentioned. On that score alone we agree with the learned counsel for the appellant that the finding of a *prima facie* case on the charge under s. 39B of the Act for which the appellant was called upon to enter his defence was wrong. But that does not mean that there was no case at all for the appellant to answer. By having P5 under his custody or control which contained the cannabis, the appellant under s. 37(d) is deemed to have been in possession of the cannabis with the requisite knowledge. Going through the evidence, we agree with the learned judge that the appellant had failed to rebut the said presumption under s. 37(d) of the Act. Hence, his defence ought to be called under s. 6 of the Act for being in possession of 882.3 grams of cannabis, but not to call for his defence under s. 39B of the Act upon making use at the same time the operation of presumption under s. 37(da) of the Act. This is because the basic or primary facts needed to find the appellant of being 'in possession' of the drug is lacking. On the submission by the learned Deputy relating to *Tunde Apatira*, that case can easily be distinguished. In that case, the Federal Court while following *Muhammed bin Hassan*, upheld the conviction under s. 39B despite the misdirection by the learned judge of the first instant in applying the double presumption, the totality of the evidence in that case reasonably supports the conclusion that the appellant there was in actual possession of the proscribed drug at the material time. Hence, without the aid of s. 37(d), the presumption under s. 37(da) remaining unrebutted, would establish the offence of trafficking. However, in our present case there was no evidence established of actual possession of cannabis in the appellant. As regard the case of *Teh Geok Hock*, according to the report, throughout the trial the appellant there never disputed the fact that at the time of his arrest he had ten small plastic packets of heroin concealed under the front part of his underpants. Hence, there was not a need to apply the s. 37(d) presumption. Indeed, the prosecution there never made use of the presumption under s. 37(d) of the Act. The only presumption invoked was under s. 37(da) to get round the issue of trafficking. The fact that the appellant here jumped out of the *perahu* upon seeing PW4 in uniform calling for the boatman, would not mean that he actually knew that he was having in his possession the said cannabis. The prosecution need to produce evidence of actual knowledge of the drug by the appellant so as to invoke the presumption under s. 37(da) of the Act, which the prosecution had failed to do so.

Having satisfied ourselves that the prosecution had established a *prima facie* case of possession under s. 6 of the Act, we come to the defence put up by the appellant. Having considered the evidence and the judgment of the learned judge, *albeit* on the charge of s. 39B of the Act, we are satisfied that the learned judge had properly considered the defence of the appellant. We agree with him that on the totality of the evidence, the appellant had failed to rebut on the balance of probability, the presumption under s. 37(d) of the Act in regard to the possession of cannabis of 882.3 grams in weight. As such, the appellant ought to have been found guilty under s. 6 of the Act and duly convicted under s. 39A(2) of the Act where the subject matter involved is 50 grams or more in weight of cannabis.

On the issue of sentence, the learned counsel for the appellant urged upon us to impose a minimum sentence provided by s. 39A(2) of the Act which is five years imprisonment to take effect from the date of arrest and with whipping of 10 strokes. This is because, he said, the appellant was a first offender having been arrested on 23 March 1993 and found guilty only on 30 November 1995. According to the counsel, cannabis is a type of drug which is less dangerous and the weight is only 882.3 grams. The appellant is repentant and would not commit the offence again. The learned deputy, on the other hand, cited to us the case of *Subramaniam a/l Arumugam v. Public Prosecutor* [2000] 2 CLJ 1 as our guide where the sentence imposed therein was 12 years imprisonment with whipping of 10 strokes. The subject matter involved there weighed only 236.07 grams of cannabis. We were urged to impose a deterrent sentence in view of the fact that strenuous efforts are being taken by the government to reduce abuse in the use of dangerous drugs. The number of drug addicts is on the rise. Having considered all matters and in the public interest, we formed the view that an appropriate sentence in the circumstances of the case to be imposed on the appellant ought to be 16 years imprisonment to take effect from the date of arrest with whipping of 10 strokes for the offence under s. 6 of the Act. The weight of the cannabis here is almost 18 times the minimum weight provided by s. 39(2)(f) of the Act, whereas in *Subramaniam a/l Arumugam*, the weight there was only about 5 times the minimum weight provided.